**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**GRUNBERG REALTY a/k/a FANNY GRUNBERG and ASSOCIATES, LLC**

**and** **Case No. 2-CA-36621**

**LOCAL 32BJ, SEIU, AFL-CIO**

***Susannah Z. Ringel, Esq., Margaret Luke, Esq.*** ***for the*** **General Counsel.**
***Allen B. Roberts, Esq.,*** **(Epstein, Becker & Green, P.C.) for the Respondent.**
***Katchen Locke, Esq., for the Charging Party.***

## DECISION

### Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried in New York, New York, on July 14, 15, 19 and 21, 2005.

On October 29, 2004, Local 32BJ, Service Employees International Union, AFL-CIO, herein called Local 32BJ, filed the charge herein alleging violations on Section 8(a)(1) and (3) of the Act. A complaint issued on April 27, 2005 with respect to the violations alleged in the charge.

Briefs were filed by Counsel for General Counsel and Counsel for Respondent. Based upon the entire record herein, including the testimony, exhibits, and my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

### Statement of Facts

Respondent is a domestic corporation with an office and place of business located at 15 West 55th Street, in New York City where it is engaged in the ownership and management of commercial real estate in and around New York City. Respondent, annually derives gross revenues in excess of $100,000.

Continental Lighting, a corporation, annually sells and delivers goods valued in excess of $50,000 directly to customers located outside the State of New York.

It is admitted that Respondent is an employer, engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

It is also admitted that Local 32BJ and the National Organization of Industrial Trade Unions, herein NOITU, are labor organizations within the meaning of Section 2(5) of the Act.

It is further admitted that Michael Grunberg and Ariel Grunberg, are co-owners of Respondent and that Susan Donahue is a building manager for Respondent's buildings and that these individuals are supervisors and agents of Respondent within the meaning of Section 2(11) of the Act.

Respondent operates two commercial buildings in New York City. Since January 2003,[1] Susan Donahue has served as Respondent's Director of Commercial Real Estate, responsible for overseeing all of the commercial properties owned by Fanny Grunberg and Associates and any of its related entities. Donahue was hired by Respondent after Respondent added to its portfolio of New York commercial buildings, a property located at 330 West 38th Street. Donahue was then placed in charge of 330 West 38th Street, as well as a previously acquired building located at 928 Broadway.

By virtue of its acquisition of 928 Broadway in 2000, Respondent for the first time was required to recognize and bargain with NOITU as the exclusive bargaining representative of its employees working at 928 Broadway. Respondent contends, and I find with the acquisition of 928 Broadway and by virtue of NOITU's pre-existing exclusive representation of the bargaining unit employees, Respondent inherited a collective bargaining obligation and the collective bargaining agreement that had been negotiated by the seller, Haddad, whose management was accomplished through its Hadson operating company.

Respondent negotiated a renewal collective bargaining agreement with NOITU for the term January 1, 2004 through December 31, 2008. The NOITU Collective Bargaining Agreement has a conventional recognition clause, providing that Respondent "recognizes and acknowledges [NOITU] as the sole and exclusive bargaining agency for all of its employees at 928 Broadway…" with the conventional exclusion of supervisors. Pursuant to the NOITU Collective Bargaining Agreement Recognition clause, both Hadson and Respondent treated Angel Gonzalez as a supervisor within the meaning of Section 2(11) of the Act, and excluded him from the collective bargaining unit.

The NOITU Collective Bargaining Agreement also has a conventional Union Security clause, providing, "the Employer shall discharge any employee covered by this Agreement not later than two (2) weeks following receipt of written notice from the Union that the employee has failed to become a member or retain membership in good standing in the Union, in accordance with the provisions of the Agreement."

Sometime, around August, 2004, after Respondent purchased 928 Broadway, Eduardo Hernandez, a unit employee testified he learned that at some of Respondent's other buildings employees were represented by Local 32BJ, Service Employees International Union. Hernandez recalled that after Respondent's purchase in 2004 he and several co-workers met with Edgar Aracena[2] and another organizer from Local 32BJ on three or four different occasions, some of them took place in the 928 building.

At a meeting on August 11, 2004, in the basement of 928 Broadway, five employees signed a letter to Respondent stating that they no longer wanted to be represented by NOITU and instead wanted to be represented by Local 32BJ. Two more employees signed on the

[1] Unless otherwise noted all dates referenced shall be 2004.

[2] Aracena's name is transcribed variously as Elgar Rosana, Andrew Alasenja, and Seneca; it is clear from context and documents in evidence that the correct name of the 32BJ representative identified by witnesses is Edgar Aracena.

following two days. These employees also signed membership cards for Local 32BJ. On September 21, 2004, Donahue received a letter from Local 32BJ District Operations Organizing Director, Edgar Aracena, in which Aracena states:

> I write to advise you that the building service employees at 928 [Broadway] are organizing with the Service Employees International Union, Local 32BJ. We request that you agree to a card check to determine whether a majority of the employees have authorized Local 32BJ to represent them. This is not a demand for recognition.
>
> Please contact the undersigned at (212) 388-3341 if you have any questions.

Respondent replied to Local 32BJ's September 21 letter on September 22, acknowledging receipt of the September 21 letter and advising Local 32BJ of NOITU's representation status. The employees, at about the same period of time sent a letter to NOITU, informing them that they did not wish to be represented by NOITU. In an October 12, 2004 letter, employees asked NOITU to respond in writing to Hernandez to various questions about their union representation. Hernandez recalled that on Aracena's last visit with employees at 928 Broadway, Aracena told them that they had to wait until the NOITU contract expired to change unions.

Sometime during the exchange of the letters described above, Gonzalez, an individual I find, as set forth below, to clearly be a Section 2(11) supervisor, testified that Donahue called him asking if he knew that some unit employees wanted to join Local 32BJ as set forth above.

Gonzalez further testified that he had another conversation shortly afterward which took place when he was in the freight area of 928 Broadway, taking out the garbage. He testified Donahue walked into the freight area and told him that management wasn't happy with his performance, and felt he had, "something to do with [32BJ]". Gonzalez told her he had nothing to do with Local 32BJ and that it was Eduardo Hernandez who "did that".

Gonzalez testified that on a Friday in August or September 2004, he was on the fourth floor with Hernandez and unit employee Lonnie Harris. Grunberg and Hernandez were replacing ceiling tiles. Donahue emerged from the elevator right next to where Gonzalez was working, walked to Hernandez, and asked him whether he signed up for Local 32BJ. Hernandez said "Yes." Donahue told Hernandez that he was already a member of a union and couldn't go into Local 32BJ. Hernandez responded that NOITU was put in by management and not the workers. Donahue then said Respondent had a contract with NOITU and employees, couldn't become members of [32BJ]. She told Hernandez if he "wanted to be a member of Local 32BJ, to go to a "damned building" that was represented by Local 32BJ. At that point, Gonzalez and Donahue went into room 400, where Donahue gave Gonzalez the payroll checks. She said, "they think [32BJ] is so good, last time they went on strike, they couldn't even afford money to pay the employees, their members." She then said that she could replace the security guards with subcontractors because the NOITU contract allowed subcontracting. She also said she could replace the painter, Lonnie Harris.

Hernandez testified to this conversation somewhat differently.

Hernandez recalled that Donahue approached Hernandez, Gonzalez and Harris while they were working on the 4th floor. Hernandez was working fixing ceiling tiles in the hallway; Gonzalez was in a room near the passenger elevator and Harris was near the freight elevators. Donahue came out of the passenger elevator and told Gonzalez, "You're the one who started all of this." She then took Gonzalez into an office on the 4th floor.

This testimony is clearly inconstant with Gonzalez' testimony.

The following week, Hernandez remembered being on the fourth floor again, changing light fixtures while Harris was painting walls and Gonzalez was fixing the electric lines. Donahue arrived and yelled at Hernandez, "You can't change unions because you are under contract already with NOITU." Hernandez told her that he hadn't signed any contract with NOITU and as an American citizen he could choose his own union. He asked her who signed the contract. Donahue answered that Respondent had signed it and then said, "I got the right to fire any security guard and the painter," and finally, "If you don't like to work here, get out of here and look for a job with 32B/32J." As set forth below, I do not credit Hernandez' testimony.

Lonnie Harris testified as to the same incidents that in around late August, he was on the fourth floor of 928 Broadway painting. Gonzalez was in the office on the fourth floor and Hernandez was around the corner about six feet from Harris. He recalled Donahue arriving and telling Hernandez, "You want 32BJ, go to a 32BJ building". Harris remembered Hernandez saying that he didn't bring Local 32BJ into the building. Donahue then spoke to Gonzalez but Harris couldn't hear what she said.

As set forth below, I find Donahue a totally credible witness. Donahue testified she never saw the petition "To Fanny Grunberg" signed by employees on August 11, 2004, prior to the trial. She testified that the first time she spoke with any building staff at 928 Broadway about Local 32BJ was after she had received Aracena's September 21, 2004 letter. She testified that she approached Gonzalez on September 23, when he and other employees were working on the fourth floor, "because he was the men's supervisor and he was in the building every day, and I felt that if they were organizing under Local 32BJ that he should have known and informed the office that this would be coming." Donahue denied telling Gonzalez he had "something to do with this," but admitted asking Gonzalez whether he knew anything about the employees trying to join Local 23BJ.

Donahue recalled talking to Gonzalez in Room 400:

> I asked him if he knew anything about any of the guys organizing or trying to organize under 32BJ and he said no. And I asked him if he knew if they were upset with NOITU because they were under contract with NOITU. And he said "I don't get involved in that. That's their problem with the Union. I have nothing to do with the Union." And I said did they come to you with issues that haven't been resolved. And he said I don't get involved with the Union. That's their problem. … I told him he should have known it was going on because it's his building and these are, these are his men.

Donahue also testified that she also spoke to Hernandez and Harris on September 23. Donahue said that she told Hernandez that, "if he wanted to be a member of Local 32BJ he would have to go get a job or he should go get a job at a Local 32BJ building." She testified that

Hernandez told her Local 32BJ had said they "don't have to listen to NOITU" and could come in and be his Union. She also testified:

> I told Eduardo that I was informed that the guys were looking to organize under 32BJ and that they were currently under contract to NOITU and that we were bound by a contract with NOITU and I couldn't just change the contract because they wanted me to and that if they had an issue with the current contract they were working under that I would be happy to try to work with the Union to try to come up with something that would make them feel more comfortable, but we were all contract to NOITU.

Hernandez credibly testified that on or about September 23, he spoke to Aracena. Aracena told him that Local 32BJ could not represent the 928 Building employees because they already had a collective bargaining agreement with NOITU.

Donahue testified that while at 928 Broadway on September 23, Donahue saw Hernandez and Harris, both of whom were working with Gonzalez on the fourth floor hallway. Donahue told Hernandez that the existing NOITU Collective Bargaining Agreement precluded Respondent from recognizing Local 32BJ, adding that Respondent was bound by a contract with NOITU and must work within its confines.

In connection with credibility between Gonzalez and Donahue I credit Donahue's testimony over that of Gonzalez where they are inconsistent.

I was particularly impressed with Donahue's demeanor. She was very forthwright, calm and unflappable. She testified in great detail, her testimony covering all facets of the complaint. Essentially she was Respondent's only witness. Her testimony on direct and cross examination was consistent, extremely detailed and supported by exhibits in the record.

**The Supervisory Status of Gonzalez**

A major issue in this case is whether Gonzalez is a Section 2(11) supervisor. It was admitted that NOITU had a collective bargaining agreement with the 928 building, which Local 32BJ did not dispute. Therefore there was no reason to threaten, coerce, make promises to employees, intimidate, or interrogate employees. Although there was testimony as to a few conversations between Donahue, Gonzalez, Hernandez and a painter, Lonnie Harris, concerning Local 32BJ and NOITU, there were contradictions concerning the same events between these individuals and Donahue. I credit Donahue over the Gonzalez, Hernandez and Harris [3] that prior to Respondent's acquisition of 928 Broadway, Gonzalez had been the building manager or superintendent, and he was identified as such in documents provided to Respondent by Haddad. Upon acquiring 928 Broadway, Respondent made no initial changes in Gonzalez' position as superintendent, continuing to hold him responsible for oversight for the building and its employees, and Gonzalez continued to be excluded from the NOITU bargaining unit. Gonzalez was considered by 928 Broadway employees to be their supervisor and the recipient of better pay and medical benefits. Just as he treated himself as being excluded from

[3] Hernandez' credibility will be discussed in detail during the section of this decision concerning Hernandez' discharge.

the NOITU bargaining unit, Local 32BJ similarly excluded Gonzalez from its organizing discussions with 928 Broadway employees.

Gonzalez was considered to be the supervisor of employees at 928 Broadway by himself, Hernandez and other employees. He admitted he had authority to discipline employees, he assigned work and directed employees, and he assigned overtime or authorized it, in addition to scheduling Saturday work. Unlike bargaining unit employees, Gonzalez was salaried, receiving more than $1,000 per week, and he was the only individual at 928 Broadway possessing an office and eligible to participate in Respondent's pension plan.

Also unlike Respondent's bargaining unit employees, Gonzalez was not a member of NOITU, and he did not participate in dues deduction. Gonzalez admits he had discretion to engage others to provide services at the building and he used checks drawn payable to himself for those services.

Although there was a paring of Gonzalez' responsibility based upon Donahue's lack of confidence in his discretion to expend Respondent's funds, in late March 2004, Respondent detailed for Gonzalez his core responsibilities in a document headed "928 Broadway Super Areas of Responsibility." Gonzalez admits that he had responsibility to perform all listed responsibilities, including:

> Supervise staff
>
> > Provide direction and work and make sure all workers are producing at acceptable levels
> >
> > Provide guidelines for acceptable behavior and appearance for security
> >
> > Make provision for replacement workers with notification to management
> >
> > Maintain records of sick, vacation and holiday for all 928 workers
> >
> > Provide written warnings to personnel not performing up to par
>
> * * *
>
> > Provide labor for minor construction and preparation for space for new tenants
> >
> > Generally oversee day to day operation of all building related issues

During 2004, Gonzalez continued to have authority to request checks drawn payable to him for his engagement of individuals to work at 928 Broadway.

The Act excludes from its definition of "employee" any individual employed as a supervisor. The Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

> reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) sets forth a three-part test for determining supervisory status. Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions; (2) their exercise of such authority requires "independent judgment" and is not merely routine or clerical, and (3) their authority is held "in the interest of the employer." See, *NLRB v. Kentucky River Cmty. Care, Inc.,* 532 U.S. 706, 712 (2001).

An individual need only exercise one of the functions enumerated in Section 2(11) to be found to be a supervisor. *Kentucky River Cmty. Care, supra*; *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 264 (2d Cir. 2000); *Butler-Johnson Corp. v. NLRB,* 608 F.2d 1303, 1306 n.4 (9th Cir. 1979) ("[t]he enumerated functions in Section 2(11) are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance, is sufficient to confer supervisory status") *(citations omitted.)*

Those who use independent judgment in directing other employees are supervisors within the meaning of Section 2(11). *DST Industries,* 310 NLRB 957, 957-58 (1993) (finding three individuals to be supervisors where they independently set job priorities of the employees in the body shop and regularly gave them direct assignments about what work to perform, approved of and monitored vacations taken by employees); *Custom Bronze & Aluminum Corp.,* 197 NLRB 397, 397-98 (1972) (finding that although individual did not have the authority to hire or discharge, reward, promote, suspend, layoff, discipline, reprimand employees, effectively recommend such action, or handle grievances, he was a supervisor because he alone was responsible for the work of the shop employees and the daily productivity of the shop, exercised responsibilities and duties that his colleagues did not, scheduled and assigned work, gave employees their orders and instructions, helped them in performing their jobs, made certain that the work was done and done properly, and determined whether overtime or additional help was needed.)

Even after his responsibilities were pared down because Donahue lacked confidence in his discretion to expend Respondent's funds, Gonzalez acknowledged that he still had responsibility for performing numerous supervisory responsibilities described above. Gonzalez used his independent judgment, had authority that was not of a "mere routine or clerical nature" to oversee day-to-day operations at 928 Broadway and performed a multitude of supervisory tasks in the interest of the Respondent. Gonzalez had authority to discipline employees; he assigned work and directed employees, and he assigned overtime or authorized it, in addition to independently scheduling Saturday work. He also had discretion to engage outside employers to provide services at the building and he used checks drawn payable to himself for those services. The evidence establishes that Gonzalez had the authority to, and in fact used his own discretion to perform, not just one, but many of the enumerated supervisory functions identified in Section 2(11) of the Act.

Secondary indicia also confirm that Gonzalez was a statutory supervisor. First, the terms and conditions of Gonzalez' employment were significantly different from those of the bargaining unit employees; he received better pay and medical benefits; he was salaried, receiving more than $1,000 per week; he was the only employee at 928 Broadway eligible to participate in Respondent's pension plan; he was not a member of NOITU, and he did not

participate in dues deduction; and he was the only employees with an office at 928 Broadway, which he used exclusively. See, *McClatchy Newspapers, Inc.,* 307 NLRB 773, 773 (1992).

Additionally, Gonzalez had apparent supervisory authority from Respondent and from his prior employer whose documents identified Gonzalez as the building manager. The NOITU bargaining unit employees at 928 Broadway considered Gonzalez to be their supervisor. See, *SAIA Motor Freight, Inc.,* 334 NLRB 979, 979 (2001) ("the test is whether under all the circumstances," the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management) *(citations omitted)*. Moreover, even Local 32BJ officials and Gonzalez himself understood that he ought to be excluded from the bargaining unit, as he had always been, because of his role and responsibilities at 928 Broadway.

Counsel for General Counsel contends that in the absence of evidence that Gonzalez has exercised statuary functions described in Section 2(11) of the Act, he is not a statutory supervisor. However all that is required is that he has the authority to exercise a single Section 2(11) function. The evidence establishes, and Gonzalez admits that he had the authority to provide written warnings to employees not performing the duties up to par; *Kentucky River Cmty. Care; Schnurmacher Nursing Home* and *Butler-Johnson Corp, supra.*

In view of the facts set forth above, and the analysis, I conclude that Gonzalez is a supervisor within the meaning of Section 2(11) of the Act.

**The Discharge of Gonzalez**

On February 17, 2004, long before the Local 32BJ and NOITU issue in September, Michael Grunberg issued a "Termination Warning" to Gonzalez. The warning references the sprinkler system freezing. Gonzalez recalled that in fact the standpipe, but not the sprinkler, had frozen around the time of that warning. He called Donahue about the problem and tried to fix it, but despite his and Eduardo Hernandez's efforts, the problem could not be fixed and Donahue brought outside contractors who advised replacing the tank altogether. At the time of Gonzalez's discharge in October 2004, this problem had still not been rectified. The warning also references Gonzalez "supervising" outside contractors, which Gonzalez explained meant that he needed to meet contractors who visited the building. Whether the warning was fair, it establishes that Respondent was unsatisfied with his performance.

Ariel Grunberg issued a "Second Warning" to Gonzalez dated March 24, 2004. The warning letter asserts that Gonzalez has not improved his performance since the February warning and building staff are not working at acceptable "performance levels" because of his lack of "motivation and supervision." The warning goes on to insist that Gonzalez end his work at 10 West 28th Street. [4] The warning threatens further disciplinary action if there is not "marked improvement" When he received this warning, Gonzalez told Ariel Grunberg that he, "couldn't believe what was going on" and he walked off the job, telling Ariel Grunberg that he was quitting. On the following day, Saturday, March 26, 2004, Ariel Grunberg sent a letter informing Gonzalez that he was fired for abandoning his job. However, Michael Grunberg called Gonzalez at home before Gonzalez received that letter. Michael Grunberg told Gonzalez that

[4] During his tenure at 928 Broadway, Gonzalez had a second job as a superintendent for 10 West 28th Street, a job that took less than an hour a week of his time. He told Ariel Grunberg about his work at that building within two years of Respondent's purchase of 928 Broadway. He also mentioned it to Donahue sometime thereafter.

he should ignore the termination letter that was en route because he had not approved it; he asked Gonzalez to return to work on Monday. During this conversation Gonzalez told Michael Grunberg that Susan Donahue continually picked on him.

The issuance of the second written warning to Gonzalez conclusively establishes that Respondent's position was that his work performance was getting worse, and angrily walked off the job. Respondent fired him for such conduct.

On March 28 Respondent agreed to reinstate Gonzalez.

Gonzalez's last written warning was an August 4, 2004 letter from Susan Donahue. The letter accuses Gonzalez of various infractions: failing to properly carry out Donahue's requests, failing to properly maintain paperwork, approving vacations without prior authorization, ignoring trouble alarms on the building's fire command station (on that date), failing to follow fire department instructions while the command station was partially out of service, fraudulently filling out paperwork stating that there are no problems with the sprinkler tank, and not diligently attempting to find a leak which actually existed. Gonzalez testified that these accusations were without basis in fact.

Donahue testified only generally about the period during Gonzalez's February and March warning letters and not at all about her own August 4, 2004, letter to him. Donahue testified that in February and March of 2004, Gonzalez was not following rules and regulations she attempted to impose and was not performing his duties to the level she expected, despite weekly discussions. Neither Michael nor Ariel Grunberg testified. Respondent did not issue any warnings to Gonzalez or discipline him in any way after Donahue's August 4, 2004 letter.

It is clear and documented that long before the unit employees tried to bring in Local 32BJ Respondent was dissatisfied with Gonzalez's work. Even the warning letter dated August 4 was several weeks before Gonzalez knew anything about the unit employees desire to have Local 32BJ as their representative, i.e. prior to any union activity.

On October 12, Donahue issued another written warning to Gonzalez concerning his failure to sign sprinkler system records for September and that he was discharged.

I have concluded that Gonzalez is a Section 2(11) supervisor. As a statutory supervisor he is excluded from the protection of the Act.

As a statutory supervisor, Gonzalez does not have Section 7 rights. The discharge of a supervisor, may be unlawful only to the extent it impinges upon the Section 7 rights of protected employees, and there is no basis for concluding that Respondent's discharge of Gonzalez impinged upon the Section 7 rights of the employees covered by the Act at 928 Broadway. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 404 (1982), *petition denied sub nom.; Automobile Salesmen's Local 1099 v. NLRB,* 711 F.2d 383 (D.C. Cir. 1983). Therefore I conclude Gonzalez was not terminated within the meaning of Section 8(a)(1).

If it were concluded that he was an employee within the meaning of Section 2(3) of the Act, I would still conclude that Gonzalez was not terminated within Section 8(a)(1) and (3) of the Act.

*Wright Line,* 251 NLRB 1083 (1980) enf'd 662 F.2d 899 (1st Cir. 1981) sets forth the criterion required to establish a violation of Section 8(a)(1) and (3) of the Act.

To violate Section 8(a)(3) of the Act, an employer's conduct must discriminate in a manner that discourages membership in a labor organization. Under *Wright Line, supra* the General Counsel has the initial burden to prove that union activity or other employee conduct protected by the Act was a motivating factor in an employer decision to take adverse action against an employee. A *prima facie* case of discriminatory conduct under Section 8(a)(3) of the Act requires the following: (1) that the alleged discriminatee be engaged in union activity; (2) that the employer had knowledge of these activities; (3) that the employer's actions were motivated by union animus; and (4) that the discrimination has the effect of encouraging or discouraging union membership. If the General Counsel meets this initial burden, the employer then has the burden to show that it would have taken the same action even in the absence of the protected conduct.

In this case the credible evidence clearly establishes that Gonzalez engaged in no union activity prior to his discharge on October 12. Therefore General Counsel's case fails since Gonzalez engaged in no union activity. Moreover, even if I were to credit Gonzalez's testimony I would still conclude that Respondent's actions were not motivated by union animus. In this regard, Gonzalez had received three serious written warnings about his work and discharged as a result of walking out on the job, his last written warning was weeks before the employees tried to bring in Local 32BJ.

Accordingly, I conclude General Counsel has not met its *Wright Line* burden, and conclude that Respondent did not establish a violation of Section 8(a)(1) and (3) of the Act.

**Discharge of Hernandez**

Hernandez began working at the 928 building before Respondent acquired this building.

During Gonzalez' tenure as superintendent at 928 Broadway, Donahue had one serious run-in with Hernandez that confirmed to Donahue that Hernandez was difficult, unreliable and untrustworthy. On Saturday, August 21, Donahue was walking with her fiancé after seeing a performance at a Union Square theater which ended about 9:30 p.m. On her way to Penn Station, Donahue passed 928 Broadway, looked in and was able to observe that the guard station was not staffed. She testified she was concerned, entered the building with her fiancé through an unlocked door and observed that no security employee was present, as required, but a woman was in the lobby with two children who were watching a baseball game on a television and eating snack food. Donahue asked the woman about the security guard and received from this woman an answer in Spanish that she did not understand. At the time, Donahue did not know that Hernandez was scheduled to be the security guard. Donahue's fiancé, who has a fire safety director certification, used the fire safety system to summon the missing security guard. After about ten minutes, Hernandez appeared. Donahue confronted him for being away from his station, failing to follow procedures to lock the door and for allowing his wife and children to be in the unattended building lobby watching television, Hernandez yelled at Donahue for raising her voice to him and using an obscenity in the presence of his children. Hernandez did not explain his own behavior or the presence of his family in a manner satisfactory to Donahue, and Donahue issued a warning notice to Hernandez for having left his post during the shift without locking the front door and leaving a note that he would return and for having allowed his family to remain in the building lobby and watch television during his shift. Donahue's August 26 memorandum warned that any reoccurrence would result in disciplinary action.

On November 11, Donahue issued two additional warnings to Hernandez. In one, giving Hernandez the benefit of the doubt, Donahue advised that she had learned that Hernandez had received payments from either Gonzalez or a 928 Broadway tenant, Continental Lighting, for

collecting trash. Donahue's November 11 memorandum made clear that accepting such payments for work done during company time constitutes theft. Because it appeared to Donahue that Hernandez had not initiated the activity with Continental Lighting and was acting under the direction of Gonzalez as his former supervisor, Donahue concluded that Hernandez may have assumed the behavior was acceptable, and he was spared discharge. However, Donahue cautioned Hernandez that he would be discharged if he continued to take cash from tenants for services performed while on company time. Hernandez' appreciation of the severity of the matter is revealed in his testimony, "I feel fine that she didn't fire me at that time," and his acknowledgment that Donahue was giving him the benefit of the doubt.

In his own testimony on the subject of receiving tenant payments, Hernandez vacillated between a bald denial [5] and prevarication, suggesting that his receipt of payments for Continental Lighting, a tenant, after the clear notice provided by Donahue in her November 11 memorandum was *de minimis* or for work performed after the hours he was scheduled to work for Respondent. Testimony from Continental Lighting Chief Operating Officer, Ken Ceppos, establishes otherwise. In fact, Ceppos testified that following November 11 and continuing until either the end of December or beginning of January, Hernandez continued to receive significant, unreduced payments of either $200 per month or $200 twice a month for doing the same work during hours that clearly overlapped the hours he was committed to work for Respondent.

By a second November 11 memorandum, Donahue gave Hernandez a final warning for his refusal to perform duties assigned by Rago, his supervisor, who replaced Gonzalez. Donahue's memorandum cautioned Hernandez that refusal to perform duties given to him by his immediate supervisor would result in termination. Hernandez must have understood from the second November 11 memorandum that he was expected to do the assignments given by building superintendent Rago, and , if he did not, he would be fired.

On December 9 Hernandez received a memorandum from Rago, noting tenant complaints of rudeness and tenant discomfort in Hernandez' presence. Rago's December 9 memorandum effected a two-day suspension without pay and cautioned Hernandez that "any problems" would result in his employment termination. Aware of the pervasiveness of his misconduct, Hernandez proceeded to visit each tenant to personally express his apologies.

Notwithstanding the clear message of warnings that he follow procedure and obey directives, Hernandez refused to report to work as scheduled on January 17, 2005, Martin Luther King, Jr., Day (the "Martin Luther King Holiday"). Hernandez admitted that the 928 Broadway building was open that day, as it had been for at least the prior three years, and Hernandez, along with other regular building employees, was scheduled to work as he had worked in those prior years. On direct examination, Hernandez made it seem that he did not learn that he was expected to work the Martin Luther King Holiday until late in the day on the Friday preceding the holiday. Hernandez's cross-examination contradicts that and shows that he had addressed with his wife his known obligation to work on the Martin Luther King Holiday. In any event, it was not until January 14, that Hernandez for the first time revealed to Respondent that he would not work, stating that his wife had a medical appointment that would require his presence at home to care for their children, aged 9 and 13. Hernandez did not report for work on January 17, 2005, and his employment was terminated on January 21. The

[5] Q: And did you understand the sentence that says "If in the future we find you taking cash for services to tenants that you are performing on company time, you will be fired immediately." Did you understand that?
A: Yes. I understand that. I never did again.

January 21, 2005 memorandum terminating Hernandez' employment expressly notes that the preceding memorandum specifically advised that any subsequent write up would lead to Hernandez' employment termination.

To explain his failure to work as scheduled and instructed, Hernandez offered several excuses. He presented a printout of an appointment made on December 23, 2004 for his wife to receive a mammogram at Lincoln Medical and Mental Health Center at 2:15 p.m. on January 17, 2005. Hernandez also claimed that Rago relented on January 14, 2005 and authorized Hernandez' absence from work. However, during cross-examination, Hernandez made it clear that Lincoln Hospital is a mere twenty minutes from his house and that he had known for at least four days about any purported schedule conflict occasioned by his wife's medical appointment – without disclosing to Respondent that he would be unable to work on the Martin Luther King Holiday, as he had done for at the least the preceding three years and as he was expected to do in 2005. Hernandez also admitted that child care is available from other sources.

After receiving notice of his employment termination Hernandez wrote identical letters on January 27, 2005 to Ariel Grunberg and Donahue advising that Rago told him he could take a sick day on January 17 and requesting reversal of the termination decision. Hernandez testified that he knew Rago had not disclosed to Donahue the alleged grant of permission for Hernandez' absence on January 17. When Hernandez called Donahue after having sent his letter, Donahue testified that she would not discuss the matter with him and referred him to his NOITU representative, because she had become aware from investigation of the initial Section 8(a)(1) unfair labor practice charge and its first amendment that her oral statements could become twisted and misconstrued. Thereafter, Hernandez' discharge was submitted to arbitration in a proceeding where NOITU and Hernandez were represented by counsel and Respondent was represented by Donahue. Arbitrator Eugene T. Coughlin directed that Hernandez be reinstated without back pay, the period from the date of termination to the date of reinstatement being considered a suspension with loss of pay.

**The Credibility of Hernandez**

I was totally unimpressed with Hernandez' demeanor. I found his demeanor when he was cross-examined was belligerent in his manner and tone. This finding is consistent with his admitted similar demeanor that resulted in his having to apologize to each tenant in the 928 building. Moreover, I found a significant contradiction as to the Martin Luther King warning letter. On his direct testimony he testified that he regularly took the King Holiday for the past several years because it was set forth in the NOITU agreement as a holiday. However, on cross-examination he admitted that notwithstanding the NOITU agreement, the employees did work on the King Holiday, and that he worked on the King Holiday during this period himself. Further, he claimed he had to take his wife for a medical examination on the date of the King Holiday. However, his purported excuse for not working on the 2005 King holiday dissipated with the revelation that he knew well ahead of January 14 that his wife had a medical appointment at a hospital about twenty minutes from their house and that the appointment was not until 2:15 in the afternoon, as well as his admission that child care can be arranged for his 9 and 13 year old children from other sources.

Additionally and significantly Hernandez was warned by Donahue not to take any money from tenants of the 928 building. However, notwithstanding such warning, Ceppos, the president of Continental Lighting, and a tenant in the 928 building, and a neutral witness testified that he paid Hernandez at least $200 a month to take out his trash after Donahue's warning, described above.

As set forth above I found Donahue to be a truthful witness.

Accordingly, I find Hernandez to be a completely untruthful witness.

## The Discharge of Hernandez

Applying *Write Line, supra,* any union activity in connection with Local 32BJ, NOITU and Respondent was minimal and ended months before his discharge. Further, most of the warning letters from Respondent concerning Hernandez' work were issued months before any union activity occurred. Moreover, given the credible testimony of Donahue, General Counsel has failed to establish at best minimal union activity.

Additionally, Hernandez was discharged long after the minimal union activity resulting from a long series of written warnings. According, I find General Counsel failed to meet its *Write Line* burden. Accordingly, I find Hernandez was not discharged in violation of Section 8(a)(1) and (3).

## The Arbitrator's Decision

As suggested by Donahue, Hernandez filed a grievance pursuant to the NOITU Collective Bargaining Agreement after his discharge, and NOITU proceeded to arbitration on his behalf. Aware of the underlying unfair labor practice charge, during the arbitration proceeding the Arbitrator afforded Hernandez a "[f]ull opportunity" to be heard and asked if he had "any additional evidence or proof to present". After the close of this arbitration hearing, the Arbitrator granted Hernandez reinstatement with a loss of pay suspension.

The Board will defer to an arbitrator's determinations when the proceedings appear to have been fair and regular, all parties had agreed to be bound, the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act and the arbitrator has considered the unfair labor practice issue. *Spielberg Mfg., Co.,* 112 NLRB 1080, 1082 (1955); *Bell-Atlantic-Pennsylvania,* 339 NLRB 1084, 1084-85 (2003), *affd. sub nom.; Communications Workers of America v. NLRB,* 99 Fed. Appx. 223 (D.C. Cir. 2004). No party has contended that the arbitration was unfair or has challenged the determinations of the Arbitrator, and Hernandez had a full and fair opportunity to testify, offer evidence and he be heard regarding the unfair labor charge being decided in this case. Accordingly, I find the Arbitrator's determination that Hernandez' misconduct on January 17, 2005 warranted a time-served suspension deserves customary Board deference. *Aramark Servs. Inc.,* 344 NLRB No. 68, (Apr. 29, 2005) (Board deferred to arbitrator's determination that employee deserved a loss of pay suspension rather than a discharge, and found that employer nevertheless did not commit an unfair labor practice by discharging the employee because the arbitrator found employee's misconduct permitted discipline.) A heavy burden is placed upon a party opposing deferral to show that an arbitration decision does not merit deferral by the Board. *Martin Redi-Mix,* 274 NLRB 559, 559-60 (1985); *Olin Corp.,* 268 NLRB 573, 573-74 (1984). I find Counsel for the General Counsel has not carried that burden. *Laborers International Union, Local 294 (AGC of California),* 331 NLRB 259, 260 (2000) (Board deferred to arbitration award even though it granted a lesser remedy than the Board would have ordered for unfair labor practice.)

## Conclusions of Law

1. Respondent is an employer as defined in Section 2(2), (6) and (7) of the Act.

2. Local 32BJ and NOITU are labor organizations as defined in Section 2(5) of the Act.

3. At all times material herein Respondent and NOITU are parties to a collective bargaining agreement covering a unit of the employees in the 928 building .

4. Respondent has not committed any violation as alleged in the complaint.

## Recommendation

I recommend the complaint should be dismissed in its entirety. [6]

Dated, Washington, D.C.

Howard Edelman
Administrative Law Judge

[6] Respondent submitted a motion to correct the transcript. Counsel for the General Counsel and Counsel for the Charging Party have not objected to this motion. Accordingly I grant this motion. A copy of this motion is included with Respondent's brief.